140

No. 09-1125

IN THE

Supreme Court of the United States

GLENN ALLEN ADAIR d/b/a
SUPER D 229, *et al.*,
Petitioners,

v.

LEASE PARTNERS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO RESPONDENT'S OPPOSITION

PAUL N. DAVIS
Counsel of Record
BUTLER, SNOW, O'MARA,
STEVENS & CANNADA, PLLC
1020 Highland Colony Parkway
Post Office Box 6010
Ridgeland, Mississippi 39158
(601) 948-5711
paul.davis@butlersnow.com

May 3, 2010

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY ARGUMENT	1
CONCLUSION	9

TABLE OF AUTHORITIES

CASES	Page
Bank of Oklahoma, N.A., Grove Branch v. Islands Marina, Ltd., 918 F.2d 1476 (10th Cir. 1990)	2
Brockman v. Merabank, 40 F.3d 1013 (9th Cir. 1994)	5
Buchner v. F.D.I.C., 981 F.2d 816 (5th Cir. 1993)	5
Carnegie-Mellon University v. Cohill, 484 U.S. 343, 108 S.Ct. 614 (1988)	5, 6
Casey v. F.D.I.C., 583 F.3d 586 (8th Cir. 2009)	7
Diehl v. F.D.I.C., 1994 WL 68239 (9th Cir. 1994)	2
F.D.I.C. v. Four Star Holding Co., 178 F.3d 97 (2nd Cir. 1999)	7, 8
Federal Sav. & Loan Ins. Corp. v. Griffin, 935 F.2d 691 (5th Cir. 1991)	5
Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 115 S.Ct. 2227, 132 L.Ed.2d 375 (1995)	8
Kansas Public Employees Retirement System v. Reimer & Koger Associates, Inc., 77 F.3d 1063 (8th Cir. 1996)	5, 7
Matter of Meyerland Co., 960 F.2d 512 (5th Cir. 1992)	5
Mizuna, Ltd. v. Crossland Federal Sav. Bank, 90 F.3d 650 (2nd Cir. 1996)	2
Myers v. Moore Engineering, Inc., 42 F.3d 452 (8th Cir. 1994)	2
New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc., 101 F.3d 1492 (3rd Cir. 1996)	1, 8, 9

TABLE OF AUTHORITIES—Continued

Page

Osborn v. Haley, 549 U.S. 225, 127 S.Ct. 881(2007) 3, 4, 5, 9

Spring Garden Associates, L.P. v. Resolution Trust Corp., 26 F.3d 412 (3rd Cir. 1994) 5

STATUTES AND RULES

12 U.S.C. §1819 ..... 2, 6, 9

U.S.C. §2679 ..... 3, 4, 6

IN THE

Supreme Court of the United States

No. 09-1125

GLENN ALLEN ADAIR d/b/a
SUPER D 229, *et al.*,
Petitioners,

v.

LEASE PARTNERS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO RESPONDENT'S OPPOSITION

REPLY ARGUMENT

1. Pursuant to Rule 10(a), a writ of certiorari should be issued because Respondents openly admit that *New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc.*, 101 F.3d 1492, 1497-1511 (3rd Cir. 1996) contains a "detailed analysis" which squarely conflicts with the Fifth Circuit's decision in this case. Indeed, *New Rock* provides a thorough examination of reasons why the "time of filing" doctrine does not apply and why only supplemental jurisdiction remained after the District Court below dismissed the FDIC. *Id.*

Respondents also admit that *Mizuna, Ltd. v. Crossland Federal Sav. Bank*, 90 F.3d 650, 657 (2nd Cir. 1996), *Myers v. Moore Engineering, Inc.*, 42 F.3d 452, 454 (8th Cir. 1994), *Bank of Oklahoma, N.A., Grove Branch v. Islands Marina, Ltd.*, 918 F.2d 1476, 1480 (10th Cir. 1990), and *Diehl v. F.D.I.C.*, 1994 WL 68239, 2 (9th Cir. 1994) conflict with the Fifth Circuit's decision in this case. Respondents attempt to downplay these decisions because they do not contain a "detailed analysis" of the discretionary remand issue. However, an equally appealing argument is that no detailed analysis is necessary because it is so patently obvious that there is no continuing federal interest after dismissal of the FDIC. Judge Jolly needed only one paragraph in his concurring opinion below to explain his view that remand is discretionary following dismissal of the FDIC. *See* Pet. App. at 15a.

2. Respondents also tacitly admit the importance of the issue presented here as one which is likely to keep re-occurring until this Court resolves the conflict. Respondents did not dispute the list of district court cases conflicting with the Fifth Circuit's decision, as footnoted in Petitioners' petition, that further demonstrates this point. Respondents were also unable to dispute the likelihood of numerous recurrences of the issue presented here in the future as the FDIC continues to take over failed institutions.

3. Petitioners have never disputed Respondents' argument that the intervention of the FDIC in this suit gave the District Court jurisdiction over the entire suit. 12 U.S.C. §1819(b)(2) plainly so provides. However, the fact that the statute declares that the FDIC's intervention made this entire "suit" "deemed to arise under the laws of the United States" does not

mean that Petitioner's individual state law claims against Respondents were somehow converted into federal law claims. Respondents argue to this Court the Fifth Circuit's two-fold holding that Petitioners' state law claims against parties unrelated to the FDIC arose under federal law on the date of removal and that the "time of filing" doctrine now precludes remand. However, the Fifth Circuit's holding, and thus Respondents' argument, squarely conflicts with one of this Court's carefully crafted holdings in *Osborn v. Haley*, 549 U.S. 225, 245, 127 S.Ct. 881, 896 (2007).

Osborn sued Haley, a U.S. government employee, in state court. Osborn also asserted state law claims against her own private employer and supervisor. The entire case was "deemed to be an action . . . against the United States" and was removed to federal court pursuant to 28 U.S.C. §2679(d)(2) which provides in part:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed . . . to the district court of the United States . . . . *Such action or proceeding shall be deemed to be an action or proceeding brought against the United States* . . . . (emphasis added).

The district court remanded the case after rejecting the Attorney General's certification. In affirming the reversal of the district court's remand order because the issues involving the United States had not been finally adjudicated, this Court provided guidance to the district court for the conduct of future proceed-

ings in the case in making the following significant holding pertinent here:

> Because a significant federal question (whether Haley has Westfall Act immunity) would have been raised at the outset, the case would "aris[e] under" federal law, as that term is used in Article III. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). *Even if only state-law claims remained after resolution of the federal question, the District Court would have discretion, consistent with Article III, to retain jurisdiction. See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350-351, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988) (when federal character of removed case is eliminated while the case is *sub judice*, court has discretion to retain jurisdiction, to remand, or to dismiss);

Haley, 549 U.S. at 245, 127 S.Ct. at 896 (emphasis added).

This Court made it very clear that: (1) even though 28 U.S.C. §2679(d)(2) mandated that the entire case be deemed to be a suit against the United States and thus arise under federal law at the time of removal, the state law claims against Osborn's private employer and supervisor did not lose their state law character, and (2) if any of those state law claims were left to be resolved after final resolution of the federal question presented by the United States' presence in the suit, then the district court would have discretion to remand at that time. That is precisely the analogous situation that prompted the District Court below to remand this suit to state court after dismissal of the FDIC.

4. For at least two reasons Respondents have misplaced their reliance on *Brockman v. Merabank*, 40 F.3d 1013 (9th Cir. 1994), *Buchner v. F.D.I.C.*, 981 F.2d 816 (5th Cir. 1993), *Matter of Meyerland Co.*, 960 F.2d 512 (5th Cir. 1992), *Federal Sav. & Loan Ins. Corp. v. Griffin*, 935 F.2d 691 (5th Cir. 1991), *Spring Garden Associates, L.P. v. Resolution Trust Corp.*, 26 F.3d 412 (3rd Cir. 1994), and *Kansas Public Employees Retirement System v. Reimer & Koger Associates, Inc.*, 77 F.3d 1063 (8th Cir. 1996). First, these cases are very different from the instant suit because they involve the situation where either the FDIC (or RTC, as the case may be) or its successor has not been dismissed and thus remains as a party. Second, to the extent any of these cases could be construed to support Respondents' position, they clearly conflict with this Court's subsequent decision in *Haley*.

5. There are several additional faults with Respondents' argument that the "time of filing" doctrine applies and provides continuing jurisdiction over all of Petitioners' purely state law claims against Respondents. The issue presented here is not whether the District Court continues to have jurisdiction after the FDIC was dismissed. Both the District Court and Petitioners acknowledge that the dismissal of the FDIC did not strip the court of jurisdiction. Thus, Petitioners have never argued that the District Court was *required* to remand. Just as in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 348, 108 S.Ct. 614, 618 (1988), the real question now is whether the District Court had *discretion* to remand since all federal interests giving rise to original removal jurisdiction have now dropped out of the case. *Cohill* squarely decided this issue in the affirmative. More recently, *Haley* reaffirmed *Cohill* in

construing 28 U.S.C. §2679(d)(2), a statute that declared an entire suit would be deemed to be against the United States on the date of removal. Hence, Petitioners request a writ of certiorari.

Respondents' argument assumes, without any discussion, a *fiction* that after dismissal of the FDIC there is any real federal interest whatsoever in purely state law claims against parties not affiliated in any manner with the FDIC. Respondents' opposition is entirely silent on this critical issue. It cannot be disputed that the only federal interest in this suit was the short-lived presence of the FDIC as a party.[1] Congress chose not to address the District Court's options under 12 U.S.C. §1819(b)(2) when the FDIC no longer "is a party." This Court addressed an analogous situation in *Cohill* and squarely held that the District Court has discretion to remand in cases where all federal interests have dropped out of the case.

The previous decisions of this Court cited by Respondents demonstrate that the "time of filing" doctrine has been developed principally in the context of diversity cases. Those decisions clearly were founded on well-reasoned principles designed to accomplish important purposes such as to protect against manipulation of a district court's jurisdiction once it has attached or to protect against a loss of jurisdiction after a case has substantially progressed in federal court. Respondents do not suggest that any such issues are present in this suit. Respondents failed to offer this Court any justification, much less

---

[1] Petitioners have previously addressed the federally preempted usury claims in this suit that were non-removable, but that in any event are subject to a pending motion to be dismissed with prejudice.

a rational justification, for imposing a "feat of alchemy" (in Judge Jolly's words)[2] to permanently transform purely state law claims into federal claims merely because of the entry, and prompt dismissal, of the FDIC as a party after more than eleven years of litigation.

Respondents' reliance on the "time of filing" as addressed in *Kansas Public Employees Retirement System v. Reimer & Koger Associates, Inc.*, 77 F.3d 1063, 1066-1067 (8th Cir. 1996), *Casey v. F.D.I.C.*, 583 F.3d 586 (8th Cir. 2009) and *F.D.I.C. v. Four Star Holding Co.*, 178 F.3d 97 (2nd Cir. 1999) is misplaced. Respondents use these decisions to leap into the argument that the District Court had no discretion to remand this suit. In *KPERS*, the court applied the "time of filing" doctrine to conclude that the district court had jurisdiction over state law claims after the RTC was dismissed from an earlier suit. However, the court expressly found that it did not need to decide "the propriety of the district court's decision to retain supplemental jurisdiction," *i.e.*, whether the district court had discretion to remand if it had so chosen. *KPERS*, 77 F.3d at 1068. In *Casey*, the court likewise applied the "time of filing" doctrine only to find that the district court retained jurisdiction after the dismissal of the FDIC. While the court "questioned" whether there is discretion to remand following dismissal of the FDIC, the court's only holding on this issue was that if discretion was accepted as the standard, then discretionary remand would still not be appropriate in that particular case. *Casey*, 583 F.3d at 591-592. *Four Star* was a case filed by the FDIC in federal court. Discretionary remand was not even an issue in the case. The

---

[2] *See* Judge Jolly's characterization, Pet. App. at 15a.

appeals court merely held that the district court did not lose jurisdiction because the FDIC was dismissed after being substituted as plaintiff by a third party to whom the FDIC had transferred its interests. Unlike *Four Star*, no party remaining here in *Adair* ever had any connection whatsoever with the FDIC. Moreover, the issue here is not whether the District Court below has lost its jurisdiction, but rather is whether the District Court now has discretion to remand the remaining state law claims.

6. Respondents are wrong in asserting that Petitioner's Article III argument was not brought to the attention of the Fifth Circuit. It is true that in their briefing to the Fifth Circuit, Petitioners did not expressly state that the Fifth Circuit's decision stretched beyond the jurisdictional limits of Article III. However, a couple points should be noted. First, both in a letter supplementing their brief and at oral argument, Petitioners did expressly tell the Fifth Circuit that they relied on the reasoning set forth in *New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc.*, 101 F.3d 1492 (3rd Cir. 1996). The *New Rock* Court explained that part of the reasoning supporting Petitioners' position was in fact "[t]he limited nature of federal jurisdiction." 101 F.3d at 1502. Petitioners' Article III argument presented here is taken directly from the analysis in *New Rock* which discussed at some length this Court's decision in *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 115 S.Ct. 2227, 132 L.Ed.2d 375 (1995), including the following reference to *Lamagno*:

> Justice Souter dissented, joined by three other Justices, *reasoning in part that "requiring" a federal court to keep jurisdiction over the case after the United States was no longer a party*

> *"must at least approach the limit [of 'arising under' jurisdiction under Article III], if it does not cross the line."* (emphasis added).

New Rock, 101 F.3d at 1506. That is precisely the argument that Petitioners present here. Petitioners fairly presented this reasoning to the Fifth Circuit by referring the Court to *New Rock*.

Second, this Court's holding in *Osborn v. Haley*, quoted on page 4, above, should control this case regardless whether this Court considers *Haley* solely in the context of its conflict with the jurisdictional and "time of filing" holdings announced by the Fifth Circuit and now argued by Respondents, or whether this Court also chooses to consider Petitioners' additional argument that *Haley* supports the proposition that it would exceed the limits of Article III to interpret 12 U.S.C. §1819 as *requiring* the District Court to exercise jurisdiction over state law claims following dismissal of the FDIC.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

PAUL N. DAVIS
Counsel of Record
BUTLER, SNOW, O'MARA,
STEVENS & CANNADA, PLLC
1020 Highland Colony Parkway
Post Office Box 6010
Ridgeland, Mississippi 39158
(601) 948-5711
paul.davis@butlersnow.com

May 3, 2010